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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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ITEL CONTAINERS INTERNATIONAL CORPORATION,
PETITIONER

*v.*

JOE HUDDLESTON, COMMISSIONER OF REVENUE
OF TENNESSEE

---

*ON PETITION FOR A WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF TENNESSEE*

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

The Tennessee Retailers' Sales Tax Act (Tenn. Code Ann. §§ 67-6-101 *et seq.* (1989 & Supp. 1990)) imposes a tax, at the rate of 5.5% of the transaction amount, upon the sale of "tangible personal property at retail in this state" (Tenn. Code Ann. § 67-6-201 (1989)). The statute defines a "sale" as "any transfer of title or possession, or both, exchange, barter, lease, or rental * * * of tangible personal property for a consideration" (*id.* § 67-6-102(23)(A)).

The question presented is whether application of that Act to the lease of shipping containers, delivered at points within the State for use in international transportation of goods, is barred by the Commerce Clause (Art. I, § 8, Cl. 3) or the Import-Export Clause (Art. I, § 10, Cl. 2) of the Constitution of the United States or is pre-empted by the Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301, T.I.A.S. No. 6634, 338 U.N.T.S. 103, acceded to by the United States effective March 3, 1969, or the Customs Convention on Containers, Dec. 2, 1972, S. Exec. Doc. X, 93d Cong., 1st Sess. (1973), 988 U.N.T.S. 43, acceded to by the United States, effective May 12, 1985.

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**BRIEF FOR THE UNITED STATES**
**AS AMICUS CURIAE**

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. Petitioner is a Delaware corporation with its principal place of business in San Francisco, California. It is engaged in the business of leasing cargo

containers[1] for international use. Petitioner purchases these containers abroad but, pursuant to 19 U.S.C. 1322(a) and regulations thereunder (19 C.F.R. 10.41a(a)(1), (c), (d) and (g)), the containers enter the United States duty-free, as "instruments of international traffic," with a continuous bond given by petitioner guaranteeing payment of all duties, taxes, or liquidated damages that could be assessed for failure to comply with regulations regarding any withdrawal of the containers from international commerce. Pet. App. 2a, 28a-30a.

Petitioner solicits leases for its containers through its offices located in numerous cities in the United States, but has no marketing office in Tennessee. The container leases are formally accepted only at its San Francisco office. The leases are on a per diem basis and restrict the use of containers to international commerce. Subject to this restriction, the lessee determines the route of travel and the period of use. The lessee is allowed to interchange containers at numerous locations around the world and, with certain restrictions, determine where the leased containers are to be returned at the end of the lease. Pet. App. 2a, 30a-31a, 34a.

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[1] The Statement of Stipulated Facts filed by the parties in the Chancery Court describes these containers as follows (Pet. App. 28a) (numbering of sentences omitted): "Containers are specially manufactured steel boxes, 20 or 40 feet long, 8 feet wide and 8.5 or 9.5 feet tall. The containers are uniquely designed so that they may be used to transport goods by a variety of modes, including semi-trailer truck, rail car or oceangoing vessel. The containers are secured to rolling stock while transported overland in international commerce. Because these containers are designed to be used in a variety of transportation modes, they are uniquely suited for use in international commerce."



Prior to August 1, 1985, petitioner had no employees or terminals located in Tennessee. Instead, petitioner made arrangements for its containers to be delivered and picked up in that State at depots operated by other parties. Effective August 1, 1985, petitioner leased a tract of land and buildings in Memphis, Tennessee, where it thereafter maintained a terminal building and work station to receive, store, deliver, and, in some circumstances, repair containers. Petitioner continued to allow customers to interchange containers at other depots in Tennessee, although it had no employees at those points. Pet. App. 2a, 31a.

2. Petitioner was audited by the Tennessee Department of Revenue for the period of January 1983 through November 1986. In December 1986, the Department of Revenue issued an assessment determining that petitioner owed additional sales tax for the period of the audit. Petitioner paid the additional tax, penalty, and interest (in the amount of $382,465) and then filed a request for refund. After this request was denied, petitioner brought this suit for refund. Pet. App. 19a, 24a, 34a-35a.

Upon consideration of testimony and stipulated facts (Pet. App. 27a-37a), the trial court held, as a matter of state law, that the Tennessee Retailers' Sales Tax Act applied only to transactions in which possession of the containers was transferred to lessees in Tennessee and did not apply where lessees took possession outside of the State (*id.* at 20a-21a). Because the tax did not apply to leases where possession of the containers was transferred to lessees outside of Tennessee, the court reduced the assessment of tax, penalty and interest to $158,012 (*id.* at 24a-25a).

With respect to leases where transfer of possession occurred in Tennessee, the court held that application

of the State's sales tax was not unconstitutional (Pet. App. 21a). The court observed (*ibid.*) that, under the criteria of *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), businesses are not relieved of their just share of the State's tax burden simply because they are engaged in interstate commerce. The court concluded that the Commerce Clause does not require a different result for leases of the containers involved in this case simply because they were to be used for international, rather than interstate, shipments (Pet. App. 21a-22a).

3. The State accepted the decision of the trial court and did not appeal. On petitioner's appeal, the Supreme Court of Tennessee affirmed the lower court's judgment (Pet. App. 1a-18a). The court rejected petitioner's invocation of *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), pointing out that (i) in this case the owner and transferor of the leased containers was a domestic corporation, not a foreign corporation subject to taxation, and taxed, by its own government, and (ii) the taxed transaction in this case took place in Tennessee, and was not taxed abroad, so that the Tennessee statute did not effect a multiple tax of a single international transaction (Pet. App. 5a-12a). Because the Tennessee tax otherwise satisfies the tests established by *Complete Auto*, the court concluded that its imposition did not violate the Commerce Clause (Pet. App. 12a-16a). Finally, the court held that the state tax is imposed on the leases of shipping containers, and "not [on] the value of the goods themselves" (*id.* at 18a), and is therefore not subject to challenge under the Import-Export Clause of the Constitution (Pet. App. 16a-18a).



## DISCUSSION

1. a. Tennessee provides for petitioner and its containers "police and fire protection, the benefit of a trained work force, and 'the advantage of a civilized society'." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 627 (1981), quoting *Exxon Corp.* v. *Wisconsin Dep't of Revenue*, 447 U.S. 207, 228 (1980), quoting *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979). Petitioner nonetheless seeks immunity from the Tennessee sales tax on the stated ground that imposition of the tax will increase the cost of American exports and thus impose an "unwarranted" burden on those exports (Pet. 2, 8). The same might be said of the state property taxes [2] on the terminals that petitioner occupies and uses in its business and of the federal [3] and state [4] income taxes on taxable income that includes the rent paid to petitioner by the lessees of its containers. But, as this Court has observed on more than one occasion

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[2] Cf. *Kosydar* v. *National Cash Register Co.*, 417 U.S. 62 (1974); *Joy Oil Co.* v. *State Tax Comm'n*, 337 U.S. 286 (1949); *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949).

[3] See *National Paper & Type Co.* v. *Bowers*, 266 U.S. 373 (1924); *Peck & Co.* v. *Lowe*, 247 U.S. 165 (1918).

[4] See *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425 (1980); *United States Glue Co.* v. *Town of Oak Creek*, 247 U.S. 321 (1918). Tenn. Code Ann. § 67-4-806 (1989 & Supp. 1990) imposes an annual tax upon the net earnings of corporations doing business in the State. "Net earnings" is defined in Section 67-4-805 in terms of federal taxable income, with adjustments. For corporations doing business within and outside the State, Sections 67-4-809 and 67-4-811 provide for apportionment, and an apportionment formula.

(*Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938))[5]:

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business. "Even interstate business must pay its way", * * * and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business.

The decisions of this Court demonstrate that the same considerations apply to foreign commerce,[6] although special factors such as the inability of the courts to prescribe apportionment where other nations are involved may increase the risk of multiple taxation and thus affect the determination of the "just share of state tax burden." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. at 444-454. We believe it clear that petitioner's terminals and an apportioned share of petitioner's taxable income from the leases of its containers enjoy no exemption from state taxation. We see no reason why petitioner's delivery of possession of its containers in Tennessee under leases with the carriers who use them should be immune from Tennessee's generally applicable tax on the sale or lease of tangible personal property.

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[5] See, *e.g.*, *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 616 (1981); *Complete Auto Transit* v. *Brady*, 430 U.S. 274, 288 (1977); *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 108 (1975).

[6] See, *e.g.*, *Mobil Oil Corp.* v. *Commissioner of Taxes*, *supra*; *Washington Revenue Dep't* v. *Stevedoring Ass'n*, 435 U.S. 734 (1978); *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951).



This case is, in all of its fundamentals, a replica of *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1 (1986), where the Court upheld the application of Florida's tax on the sale of fuel to common carriers, as applied to "fuel used by foreign airlines exclusively in foreign commerce" (*id.* at 4). As in *Wardair*, the tax imposed by Tennessee is upon the transfer, within the taxing State,[7] of an article used in the transportation of goods in foreign commerce. As in *Wardair* (477 U.S. at 8), there can be no doubt that the Tennessee tax satisfies the four-part test set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). And, as in *Wardair*, "there is no threat of multiple international taxation in this case, since the tax is imposed only upon * * * a

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[7] The suggestion (Br. 12) that the Tennessee tax might be duplicated at the site of the execution of the lease— stipulated to be in San Francisco (Pet. App. 30a)—is groundless under the decisions of this Court in *Standard Pressed Steel Co.* v. *Washington Revenue Department*, 419 U.S. 560 (1975), and in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). Indeed, as the Court remarked in the latter case (305 U.S. at 440), the tax is "apportioned exactly to the activities taxed." Cf. *Goldberg* v. *Sweet*, 488 U.S. 252 (1989).

Petitioner suggests (Pet. 12) that foreign nations (unrestrained by due process or commerce clauses) *might* duplicate the tax. But if that *possibility* is to govern decision, the result would be a complete immunity from all domestic taxation awarded to all participants in foreign commerce. No decision of this Court has been based upon such reasoning. Moreover, we have been advised by the Department of State that no foreign government has protested, or threatened retaliation against, application of Tennessee's sales tax to transactions involving containers used exclusively in international commerce. Petitioner's speculation that duplicative, retaliatory taxes could be imposed thus lacks any support.

discrete transaction which occurs within one national jurisdiction only" (477 U.S. at 9).

The Court in *Wardair* held specifically that nothing in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979)—on which petitioner principally relies (Pet. 9-16)—served to invalidate the State's tax on the sale of aircraft fuel to foreign airlines. See 477 U.S. at 13. For the same reasons identified by this Court in *Wardair*, *Japan Line* also has no bearing on the present case. In particular, in contrast to the present case, which involves a sales tax on a transfer occurring within a single State, *Japan Line* involved an annual property tax on equipment having no fixed location. As the Court held in *Japan Line*, when that occurs within our borders, no jurisdiction may tax the instrumentality in full; apportionment is the rule. 441 U.S. at 447. See also *Braniff Airways, Inc.* v. *Nebraska State Board*, 347 U.S. 590 (1954); *Standard Oil Co.* v. *Peck*, 342 U.S. 382 (1952); *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194 (1905). But apportionment cannot be assured when foreign nations are involved. In *Japan Line*, the containers were owned, based, and fully taxed in Japan. 441 U.S. at 451-452. It was under those circumstances that Los Angeles County was required to yield to avoid multiple taxation—the decision acknowledged a prior right to tax by Japan. But nothing in *Japan Line* suggests that if containers were owned and based in the United States, the State (or States, on an apportioned basis) that sought to impose a property tax would be required to yield to some other country that sought to tax on the basis of temporary presence. For the same reasons that foreign nations possess a prior right to tax foreign-owned instrumentalities of foreign commerce, so too does this Nation and its States possess the right



to tax the domestically owned instrumentalities of commerce.

b. Petitioner contends (Pet. 17-23) that a national rule proscribing state taxation of containers has been established under the 1972 Customs Convention on Containers, S. Exec. Doc. X, 93d Cong., 1st Sess. (1973), 988 U.N.T.S. 43 (Pet. App. 38a-41a), adhered to by the United States in 1985, and its predecessor, the 1956 Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. No. 6634, 338 U.N.T.S. 103 (Pet. App. 41a-43a), adhered to by the United States in 1969 (Pet. App. 13a-23a). As both the title of the Conventions and their definition of "import duties and taxes" (*id.* at 39a, 41a) indicate, however, the Conventions relate only to customs duties on containers, and provide for temporary admission duty-free. The States, of course, do not, and can not, impose customs duties, either on the containers or on the goods they may contain. There is no reason why a convention on the subject of customs duties should be thought to relate to generally applicable sales taxes—a now almost universal form of domestic taxation by the States. As discussed above, domestically owned containers are properly the subject of domestic taxation, and nothing in the Customs Convention on Containers alters or vitiates that principle.

2. Petitioner invokes not only the Commerce Clause, but also the Import-Export Clause (Art. I, § 10, Cl. 2) of the Constitution, and asserts that the decision below conflicts with *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), and with *Louisiana Land & Exploration Co.* v. *Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), cert. denied, 111 S. Ct. 248 (1990) (Pet. 9, 23-27). There is no conflict and no violation of the Import-Export clause.

In both the *Richfield* and the *Louisiana Land* cases, a seller of oil delivered, as agreed, a large quantity of oil f.o.b. into a waiting tanker—in *Richfield*, a tanker in the Los Angeles harbor owned by the New Zealand Navy and destined for Auckland, New Zealand; in *Louisiana Land*, a tanker situated in the Mobile, Alabama, harbor and destined for Halifax, Nova Scotia. This Court in *Richfield* and the Fifth Circuit in *Louisiana Land* held that the Import-Export Clause barred the local government from collecting its generally applicable tax on those export sales of oil.

It is instructive to compare those two cases with *Joy Oil Co.* v. *State Tax Comm'n*, 337 U.S. 286 (1949), and *Empresa Siderurgica* v. *County of Merced*, 337 U.S. 154 (1949), where, in each case, a foreign purchaser purchased in this country property for export to its country—in *Joy Oil*, 1,500,000 gallons of gasoline purchased at a Grand Rapids refinery for export to Canada; in *County of Merced*, a cement plant in Merced County, California, to be disassembled, packaged, and shipped to South America. In each case, tax day for the assessment of local property taxes arrived after much of the purchased property had started its journey but was being held temporarily before crossing the water's edge. In each case, this Court upheld application of the local property tax to that part of the property within the geographic limits of this country.

It has been suggested [8] that this Court's decision in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), abandoning the "original package" doctrine with respect to imports in favor of enforcement of generally applicable state and local taxes, should lead the Court

[8] See, *e.g.*, L. Tribe, *American Constitutional Law* 472-473 (2d ed. 1988).



to abandon the perhaps analogous line—sometimes styled the "final journey" line—drawn in the cases relating to exportation. If the "final journey" test were applied in this case, it would be clear that the transfer of possession of empty containers in inland Tennessee did not mark the beginning of the final journey of loaded containers on ships in international trade. It is not, however, necessary to deal with that question in this case.

This case involves no exports. The American-owned truck or railroad car that carries goods from points in this country to consignees in Canada or Mexico *carries exports, but is not itself an export.* The same is true of American-owned ships or airplanes carrying goods to more remote consignees. The goods will be left at their foreign destinations while the carrier, not itself an export, returns for further voyages. The same is true, of course, of the containers that petitioner leases for the carriage of goods out of United States—containers that will be returned to petitioner for further leases and further voyages. The goods are exports, but the containers are not.

This difference was recognized by this Court in *Canton R.R.* v. *Rogan*, 340 U.S. 511 (1951). The railroad in that case operated solely within Baltimore, moving freight between its marine terminal at the port of Baltimore and connecting railroads. It claimed, invoking the *Richfield* case, that some $700,000 of its gross receipts of $1,588,744 were exempt from Maryland's tax on the gross receipts of steam railroads on the ground that that figure represented the proceeds of handling imports and exports. This Court rejected that claim, stating (*id.* at 513-514):

> If this were a tax on the articles of import and export, we would have the kind of problem presented in * * * *Richfield Oil Corp.* v. *State Board*

> * * * and *Joy Oil Co.* v. *State Tax Comm'n* * * *. But the present tax is not on the articles of import and export[.] * * * The difference is that in the present case the tax is not on the *goods* but on the *handling* of them at the port.

As the Court concluded (*id.* at 515), "if the handling of the goods at the port were part of the export process so would hauling them to or from distant points or perhaps mining them or manufacturing them."

The Tennessee Supreme Court was thus correct in concluding (Pet. App. 18a) that application to cargo containers of a generally applicable tax on the sale or leasing of tangible personal property is not a tax on exports simply because the leased containers may be used in handling goods that are to be exported.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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